Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1468

MICHAEL ARNONE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by and through his attorney, JOSEPH P. KIERPIEC, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

On March 13, 1978, Appellant Michael Arnone was brought to trial before the Honorable James P. Churchill of the United States District Court for the Eastern District of Michigan, Southern Division. He was charged in a four count indictment: Pursuant to Title 18, Section 1623, making false statements to a grand jury.

Defendant Arnone was charged that he knowingly made a false declaration to the grand jury concerning his presence at conversations between an individual and an undercover agent.

Specifically, Defendant Arnone was charged that he knowingly gave false statements to the grand jury when he said: (T-25)

1. That he was never present when an individual by the name of Marshall Stillman was in possession of some white powder.
2. That he was never present when there was a conversation including Marshall Stillman, that Matt Romanari (undercover agent) would get stuff direct from Bolivia and Peru.
3. That he was never present when Marshall Stillman said that the stuff was in rock form and nearly pure.
4. That he was never present when Marshall Stillman made a statement that his source is a major importer, of coke and sells nothing less than kilos.

A motion was made by defense counsel to quash the superseding indictment in that it fails to allege that the Appellant under oath or at any time knowingly made a declaration which is inconsistent with the one made before the grand jury. (T-3).

This motion was denied. (T-15-16).

At the close of the People's proof, defense counsel moved for a directed verdict of aquittal on the grounds that the questions asked and answered by Defendant-Appellant were not material to the grand jury's investigation. (T-156). The court did not make a final determination as to materiality at the close of arguments. (T-167).

At the close of all proofs the court denied defense counsel's argument as to materiality.

Defendant-Appellant was convicted by the jury. (T-621-623). On February 20, 1978 the United States Court of Appeals, Sixth Circuit Affirmed the Lower Court. (Opinion attached).

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on February 20, 1979. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28 — U.S. Code — § 1254(1).

QUESTIONS PRESENTED

1. WHETHER TITLE 18, SECTION 1623 REQUIRES DEFENDANT-APPELLANT TO MAKE OVERT INCONSISTENT STATEMENTS WHICH ARE FALSE TO FALL WITHIN THE REQUIREMENTS OF SAID SECTION?

2. WHETHER THE STATEMENTS OF DEFENDANT-APPELLANT BEFORE THE GRAND JURY WERE MATERIAL TO THE POINT IN QUESTION IN THE GRAND JURY INVESTIGATION.

STATEMENT OF THE CASE

Appellant, in the instant case, was charged with intentionally and knowingly making a false statement to the Grand Jury. The appellant was charged with having *"overheard"* a conversation taking place in a crowded bar with juke box and the television on. Appellant is also accused of having seen someone do something with a *"white packet"* of powder in the presence of an informant. There was no testimony at the trial that the appellant had good hearing or good eyesight. What the government has tried to do in this case is convict the appellant of making a false statement based upon a subjective reception of stimuli he may have received from the environment of the bar. For example, the government is saying "he had to overhear the conversation because anybody with normal hearing would have heard the conversation." This was not the intent of the legislature in passing Title 18 § 1623. By this interpretation of the law, it would be possible for

the government to prosecute an individual under this particular section by alleging he sensed something with his five senses "to wit: he saw something, he touched something, he heard something, he smelled something, or tasted something." This certainly is not in line with proving an individual guilty beyond a reasonable doubt.

The real crux of this Petition is to determine whether we are going to allow prosecution of an individual based upon subjective reception of stimuli from the environment to prove false statements.

The second area of consideration in this matter is whether or not the questions asked of the appellant were material to the Grand Jury's investigation when the jury foreman testified at the trial that the questions were not material.

REASONS FOR GRANTING WRIT

The record below reflects that the Petitioner was convicted for making false statements to a Grand Jury based upon information he *subjectively* received from the environment. Title 18 § 1623 provides that an individual may be convicted for making a false statement to a Grand Jury, but nowhere does the statute indicate, nor are there cases, nor legislative history to indicate that the purpose of this statute allows the Petitioner to be convicted under the facts presented in the lower court. Further the Trial Court found that the Petitioner's questions were material notwithstanding the fact that the jury foreman, under oath, stated that they were not.

Petitioner contends herein that the evidence presented by the government was not sufficient within Title 18 § 1623 for conviction. Nor was he guilty of making any material false statements to the Grand Jury based upon testimony of the Jury Foreman.

QUESTION ONE

DOES TITLE 18, SECTION 1623 REQUIRE DEFENDANT-APPELLANT TO MAKE OVERT INCONSISTENT STATEMENTS WHICH ARE FALSE TO FALL WITHIN THE REQUIREMENTS OF SAID SECTION?

DISCUSSION

Appellant in the superseding indictment is charged with knowingly making false declarations to the grand jury concerning whether or not he either overheard conversations between an undercover agent and another individual or whether he observed certain actions of different parties.

Appellant is not charged with knowingly making prior statements and then subsequently knowingly making a second false declaration before the grand jury, which were irreconcilably contradictory to declarations made prior to the grand jury.

Title 18, Section 1623(a) reads almost word for word as Title 18, 1621(1) except for the fact that Section 1621 calls for willful statements as opposed to knowing statements required by Section 1623.

Also, there is the two witness requirement under Section 1621 concerning the contradictory statements which may constitute perjury. *Wieler* v *United States*, 323 U.S. 606; *Paternostro* v *United States*, 311 F2d 298.

There was never any allegation that the questions that Appellant is charged with not having answered truthfully before the grand jury, wherever answered directly or indirectly by the Appellant at any other time, either before a grand jury, tribunal, other judicial proceeding, or before anyone else. In fact, he was only charged with having been present and allegedly overheard conversations and/or saw some type of actions by different individuals.

The legislative intent with Section 1623 was to facilitate the Government in its investigations for perjury, prosecutions and convictions. However, it was not the intent of the legislature to create a new and distinct different crime. In fact, the *Congressional Code Administrative News, Volume 2, 1970, p 4007*, gave the legislative intent of this Act when it stated:

> "That this Title is intended to facilitate Federal perjury prosecution and establish a new false declaration provision applicable in grand jury and court proceedings. It abandons the so-called two witness and direct evidence rule in such prosecutions, and authorizes a conviction based on *irreconcilable, inconsistent declarations under oath*." (Emphasis added.)

In this particular case there were no allegations either in the People's proofs or the indictment that the Appellant at any time made a statement prior to the grand jury proceedings that was inconsistent with any statements made before the grand jury.

Additionally, Judge Ferguson in dictum of the case of *In Re Baldinger*, 356 F Supp 153 (1973) said:

> "The government's position might be supportable if the phrase 'false declaration' in §6002 was intended to have the same meaning as 'false declaration' in §1623, since the latter must be made under oath to be prosecutable. The wording and legislative history of §1623 and 6002, however, belie such a contention."
>
> "Sections 1623 and 6002 were both enacted as parts of the Organized Crime Control Act of 1970. The congressional purpose in enacting §1623 was to create a new statutory offense free from the limiting common law evidentiary requirements applicable to perjury prosecutions (principally the 'two-witness rule' requiring corroboration of perjury by the testimony of two witnesses or that of one witness plus independent evidence). Section 1623(c) accomplished this goal by allowing the offense to be proven *by two irreconcilably* false declarations under oath. The false declarations statute is not coextensive in scope with §1621, since it applies only to declarations made under oath before a court or a grand jury, while the perjury statute applies 'before a competent tribunal, officer, or person . . .' "See *Housing Hearings, supra*, at 100, 163, 495. Thus, in essence, §1623 provides for an easier method of proof and for greater penalties in a limited class of perjury cases." (Emphasis added.)

The court in this case should look to the legislative intent in the passage of this law so that the position of Appellant can be seen in the proper perspective. In the

Congressional Code of Administrative News Volume 2, 1970, p 4023, the intent of Congress with respect to the Organized Crime Control Act in passing §1623 is apparent:

> Section 1623(c), as amended, provides that an indictment or information for violation of the section alleging that, in any proceedings before or *under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them was necessarily false, need not specify which declaration was false if the indictment alleges that (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under the section.* The subsection also provides that in a prosecution for violation of the section, the falsity of a declaration may be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in a proceeding before or ancillary to a court or grand jury. It will be an affirmative defense to an indictment made pursuant to this subsection that the Defendant at the time he made each declaration believed the declaration to be true.
>
> This subsection, as amended by the committee, therefore, provides specifically for the prosecution of a false declaration in the case of irreconcilable contradictory statements without the necessity of specifying which of the declarations is false. It requires that each declaration upon which the prosecution is based was material to a point in question in the

proceeding in which it was made, and was made within the period of the statute of limitations for the offense charged. The latter restriction assures that the declarant cannot be indirectly punished for a false statement for which prosecution has been barred by lapse of time. It should be noted that the subsection relates solely to the establishment of the element of falsity in the offense which is delineated in subsection (a). Knowledge, falsity, and materiality are distinct elements of the offense which must be proved materiality are distinct elements of the offense which must be proved whether a prosecution under the section is based upon a single false statement or upon logically inconsistent statements. (Emphasis added.)

This section is relatively new and case law bearing directly on the proposition that this section requires distinct statements, which are contradictory, are limited. However, in the case of *United States* v *James Kenneth Hamilton*, 348 F2d 49, the court said:

> "It's clear from the course of the language of the Statute and from the legislative history that Congress intended 1623 to abolish the two-witness rule in perjury cases where both of two or inconsistent statements were made under oath. It makes sense that in such situations the Government should be able to prove perjury by merely showing what statements were made without having to comply with the two-witness rule to prove that one of the statements were false. Plainly *one or the other* is perjurous." (Emphasis added.)

In the above instance the court was talking about two statements, one of which was perjurous. In the instant case there were not two statements alleged, but merely that Defendant-Appellant allegedly overheard conversations or saw some type of action taking place.

In fact, the section itself speaks of multiple declarations, one of which is contradictory. Title 18, Section 1623(c)(2):

> "In any prosecution under this Section the falsity of a declaration set forth in the indictment or information shall be established sufficient for the conviction by proof that the defendant while under oath made *irreconcilably, contradictory declarations* material to the point in question in any proceeding before or ancillary to any court or grand jury." (Emphasis added.)

The Section itself is discussing multiple declarations, one, which was false before the grand jury. Again, Appellant was not charged with making any statements prior to or after his grand jury appearance, which were contradictory to statements he made for the grand jury.

In fact, during the course of the trial, argument of defense counsel as to what anyone would believe to have heard or seen clearly makes it an almost indefensible charge.

For example, there was testimony by the witnesses for the People that the conversations conducted could easily be heard with anyone of normal hearing, i.e.: what is normal hearing. Also, how far could the Government carry this type of case. For example, someone was in a large room where a conversation was

taking place. Subsequently, that person appeared before a grand jury and said he did not hear anything. However, someone in the room may testify to the fact that someone with "normal hearing would have overheard the conversation." The limits are endless in this type of prosecution. Clearly the legislative intent was to merely eliminate the burdensome requirement of the two-witness rule for perjury prosecutions and allow the Government more latitude in prosecuting perjury charges. However, it was not the legislative intent to allow the Government to charge somebody with making *one* declaration before a court or other tribunal based upon possible observations or overhearing conversations.

QUESTION TWO

WERE THE STATEMENTS OF DEFENDANT-APPELLANT BEFORE THE GRAND JURY MATERIAL TO THE POINT IN QUESTION IN THE GRAND JURY INVESTIGATION?

Section 1623(1) indicates that the false declarations made to the grand jury must be material to the point in question.

The investigation of the grand jury in question was narcotics trafficking in the Detroit area. However, the foreman of the grand jury testified under oath that the questions asked of Appellant and answers given by him were not material to the investigation, in fact, did not influence them one way or the other. Clearly this would indicate that the questions, in fact, were not material, therefore, they do not fall within the purview of Section 1623.

United States v *Phillips*, 540 F2d 319, indicates that materiality is of the utmost importance and is essential to the jurisdiction of the grand jury, and also is an essential element of the crime of perjury in testifying before the grand jury has indicated that the questions asked of the Appellant were not material. Additional cases indicating that materiality is an essential element of the offense are *United States* v *Lasater*, 535 F2d 1041; *United States* v *Whimpy*, 531 F2d 7068.

The grand jury in this case was investigating someone totally different than Mr. Stillman, or Appellant. (T-68). In fact, defense counsel will ask:

> "Q. Sir, in other words, Mr. Arnone's testimony did not have any *material* effect on the grand jury's decision wanted to pursue an investigation of Marshall Stillman or not, did it?
>
> A. No, it did not.
>
> Q. Again, I would like to point out, Mr. Sherman — may I?
>
> THE COURT: If it's to complete your answer, not merely volunteer something, it is not part of the answer to the question.
>
> Q. O.K. I withdraw my comment."

From the above testimony it is clearly seen that the grand jury did not consider the Appellant's testimony material. On re-direct examination the prosecutor again asked the same question of the foreman of the jury, to wit: Whether or not the questions asked of the Appellant were material. The foreman of the grand jury responded in the negative. (T-79). There were no allegations that any of the statements that the Appellant

made were material to any proceeding with the grand jury at that time. Without this element on materiality the case should have been dismissed on the motion made by defense counsel. (T-68-81).

CONCLUSION

WHEREFORE, Michael Arnone, Petitioner, prays that this Honorable Court grant a writ of certiorari.

Respectfully submitted,

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Dated: March 19, 1979

APPENDIX A

ORDER

No. 78-5348

(United States Court of Appeals
For the Sixth Circuit)

(United States of America, Plaintiff-Appellee
v. Michael Arnone, Defendant-Appellant)

(Filed February 20, 1979)

Before: WEICK, ENGLE, MERRITT, Circuit Judges.

Appellant Michael Arnone was convicted on each of four counts of an indictment charging him with having made false statements to a grand jury, 18 U.S.C. §1623. In his appeal he alleges that, because of the nature of the questions put to him before the grand jury, he could not have been validly convicted without proof that he had made other contradictory statements prior to or after his testimony before the grand jury. While appellant's claim relates to the requirement of 18 U.S.C. §1623(c), which relieves the government of the obligation of proving which of two inconsistent statements under oath may be true, the contention is without merit with respect to the offense charged in the indictment, which need not be proven in the manner urged by appellant.

The court also finds that appellant's claim that the perjurious statements were not material to be without merit. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Supreme Court, U. S.
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No. 78-1463

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL ARNONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1463

MICHAEL ARNONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he did not violate 18 U.S.C. 1623 because he made only one false declaration before a federal grand jury and did not make two inconsistent statements; he also claims that his false statement was not material to the grand jury's investigation.

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of making false declarations before a federal grand jury in violation of 18 U.S.C. 1623. He was sentenced to four concurrent terms of one year's imprisonment. The court of appeals affirmed (Pet. App. A).

The indictment alleged and the evidence at trial showed that in August 1977 petitioner testified before a federal grand jury in the Eastern District of Michigan, which was investigating the involvement of

Sanford Hoskow and John Leming in illicit drug trafficking (Tr. 50). In the grand jury petitioner was asked about conversations about a proposed sale of cocaine that took place at his bar on May 6, 1976, and at which, at various times, petitioner, Hoskow, Marshall Stillman, a Drug Enforcement Administration informant, and a DEA undercover agent were present. Petitioner testified under oath that he was not present when Marshall Stillman was in possession of some white powder, and that he was not present during a conversation in which Stillman explained that the "stuff" would come directly from Bolivia and Peru, that the "stuff" was in rock form and nearly pure, and that Stillman's source was a major importer of "coke" who would not sell drugs in less then kilo quantities (Tr. 39-41).

The evidence at trial showed that this testimony was false. The DEA agent and the informant testified that petitioner was present at a table in his bar when Stillman discussed with them a prospective sale of cocaine. They also testified that at one point in the conversation, Stillman took petitioner and the informant into a back-room office and showed them a packet of white powder that Stillman said was cocaine, and that on several occasions, in petitioner's presence, Stillman said that his "stuff" was in rock form, nearly pure, and came from his source in Bolivia and Peru in kilo quantities (Tr. 122-128, 214, 222, 239-244, 247, 288-289, 295, 333-334).

Testifying in his own behalf, petitioner denied that he had overheard any narcotics-related discussion or seen Stillman's packet of white powder (Tr. 473-474, 479).

The district court ruled that petitioner's declarations to the grand jury were material to the grand jury's investigation (Tr. 561-564).

1. Petitioner's claim (Pet. 6-12) that 18 U.S.C. 1623 can be violated only by the making of two or more inconsistent sworn statements before a court or grand jury is frivolous. Section 1623(a) makes it unlawful for anyone who testifies under oath "in any proceeding before or ancillary to any Court or grand jury of the United States knowingly [to make] any false material declaration * * *." Section 1623(c) provides, as one method of proving the offense, that if an indictment alleges that the defendant "knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false," the indictment "need not specify which declaration is false * * *." While Section 1623(c) provides an alternative method of proving the offense described in Section 1623(a), it plainly does not limit the government to that method or establish as a necessary element of the offense the making of at least two sworn and inconsistent statements. And the courts have uniformly held that a single false statement may be prosecuted under Section 1623 upon proof that the statement was false. See *United States* v. *Devitt*, 499 F. 2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States* v. *Ruggiero*, 472 F. 2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States* v. *Clizer*, 464 F. 2d 121 (9th Cir.), cert. denied, 409 U.S. 1086 (1972). As the Second Circuit explained in *United States* v. *Lee*, 509 F. 2d 645, 646 (2d Cir.), cert. denied, 422 U.S. 1044 (1975), in considering and rejecting the precise

claim petitioner raises here, "[i]t is obvious that section 1623(c) * * * states one, but not the exclusive, method for proving falsity."[1]

2. Petitioner's claim (Pet. 12-14) that his false statements were not material to the grand jury's proceedings is contrary to the record and was correctly rejected by the district court. Although petitioner relies (Pet. 13) on the testimony of the grand jury foreman that his testimony did not have a "material effect on the grand jury's decision whether to pursue an investigation of Marshall Stillman" (Tr. 73), the testimony was still material to the investigation, as the foreman's full testimony made clear. Thus, the foreman testified that the grand jury was investigating the involvement of Hoskow and John Leming in illicit drugs (Tr. 50), that petitioner's testimony relating to conversations about a drug transaction in which Stillman and Hoskow participated was considered by the grand jury and was relevant to the investigation (Tr. 76-77, 79), and that the testimony was capable of influencing the grand jury's decision (Tr. 82-85). It is well established that the test for determining whether declarations are material is not whether they in fact influenced the grand jury but whether they were capable of influencing the grand jury on the issue before it. *United States* v. *DeMauro*, 581 F. 2d 50, 53 (2d Cir. 1978); *United States* v. *Damato*, 554 F. 2d 1371, 1372-1374 (5th Cir. 1977); *United States* v. *Kelly*, 540 F. 2d 990, 993 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *United States* v. *DeVitt, supra*, 499

[1]The authorities on which petitioner relies (Pet. 7-10) establish that the government is *authorized* to prove a false declarations offense by the inconsistent statements method of proof, not that it is *limited* to that method.

F. 2d at 139. In sum, on the basis of the record, the district court correctly concluded that petitioner's false statements were material to the grand jury's investigation.

It is therfore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

DOJ-1979-05